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No. 85-236

In the Supreme Court of the United States

OCTOBER TERM, 1985

HARRY W. EICHENLAUB, PETITIONER

v.

DAVID ALAN YURKY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a pretrial detainee has an automatic right under the Due Process Clause to a hearing before an independent tribunal in connection with his transfer from one custodial facility to another.

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INTEREST OF THE UNITED STATES

The issue in this case is whether a pretrial detainee has an automatic right under the Due Process Clause to a hearing before an independent tribunal in connection with his transfer from one custodial facility to another. The Court's resolution of this issue may affect the rights of federal pretrial detainees, of whom several hundred are transferred each year from one facility to another (see pages 11-12 note 10, *infra*).[1]

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[1] The court of appeals' opinion states more than once that this transfer was from a county jail to a state prison (Pet.

STATEMENT

1. On December 23, 1981, respondent was arrested in Pennsylvania on state charges of criminal conspiracy and criminal complicity. He was placed the next day in the Clinton County Jail (CCJ) in Lock Haven, Pennsylvania, a minimum security institution. Pet. App. 4a; J.A. 50. At that time, the warden, petitioner Harry Eichenlaub,[2] was informed by state police that respondent was connected with the Palestine Liberation Organization and had knowledge of the martial arts. On January 8, 1982, petitioner was also informed by state police that respondent had a passport to Lebanon, that the court planned to increase his bail from $100,000 to $300,000 because he had been charged with two additional robbery counts, and that federal bank robbery charges would be filed against him on January 10.[3] Pet. App. 4a-5a; J.A. 42, 54-55, 78.

On January 8, 1982, petitioner obtained oral approval from the Deputy Commissioner of the Pennsylvania Bureau of Correction and from the Clinton

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App. 8a-13a); respondent's interrogatories stress this aspect of the transfer as well (J.A. 55-56, 62-63). It is not clear whether the court meant to find a protected liberty interest requiring a hearing in connection with all transfers of pretrial detainees or only in connection with transfers to institutions with a higher level of security. We believe either ruling would be error.

[2] Eichenlaub died after the petition was filed with this Court. Insofar as he was a party in his official capacity, substitution of his successor is automatic. See Sup. Ct. R. 40.3.

[3] Federal charges were never in fact filed. Respondent was convicted of the state charges on May 19, 1982, and is currently serving his prison sentence at the State Correctional Institution at Huntingdon, Pennsylvania (J.A. 47-48).

County President Judge for emergency transfer of respondent from CCJ to the State Correctional Institution at Huntingdon (SCIH),[4] on the ground that respondent posed a security risk if he remained at CCJ (Pet. App. 5a).[5] That day, respondent was transferred to SCIH, was informed in writing that he was considered a security risk, and was placed in administrative custody pending review by the Program Review Committee of the prison (*id.* at 5a-6a, 4b).

On January 11, 1982, the Program Review Committee, in accordance with state prison policy,[6] interviewed respondent and, based on the documents prepared in connection with his inter-facility transfer, determined that he should remain in administrative custody because he was a security risk (Pet. App. 6a-7a, 5b). He remained in administrative custody for 30 days before being placed in the general prison population (*id.* at 18a, 5b; see J.A. 119a, inserted between J.A. 120 and J.A. 121). His state

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[4] Huntingdon is about 60 miles from Lock Haven (Pet. 12).

[5] An August 10, 1981, memorandum from the Commissioner of the Pennsylvania Bureau of Correction to the supervisors of county prisons and jails (J.A. 120-131) states that county prisons and jails may request transfer of an inmate to a Bureau of Correction facility for "reasons of overcrowding, security, medical purposes, or other existing conditions when the prison cannot furnish proper and sufficient accommodations for the care, custody, control, and safety of the inmates" (J.A. 120-121). A pretrial detainee is entitled under state law to notice and to a hearing if he does not consent to the transfer, but the hearing may be held by the prison's Program Review Committee after an emergency transfer (J.A. 122, 124).

[6] See August 10, 1981, memorandum (page 3 note 5, *supra*; J.A. 122, 124).

trial was held on May 18-19, 1982 (Pet. App. 5b; J.A. 47-48). During the period of administrative custody, respondent was permitted to make two telephone calls, and during his period of pretrial incarceration he was able to communicate freely with his attorneys by mail and they were free to visit him at SCIH (Pet. App. 17a-18a).

2. On May 20, 1982, respondent filed a pro se civil action pursuant to 42 U.S.C. 1983 in the United States District Court for the Middle District of Pennsylvania, alleging that petitioner, the warden and deputy warden of SCIH, and others had violated several of his federal constitutional rights (J.A. 22-36). In particular, he claimed that his transfer from CCJ to SCIH violated procedural due process; that his assignment to administrative custody violated his procedural and substantive due process rights; and that his detention at SCIH denied him his Sixth Amendment right to effective assistance of counsel (J.A. 22-36; Pet. App. 5b-6b). He sought compensatory and punitive damages from the offending officials and an "[i]njunction against future transfer of pre-trial detainees to [SCIH]" (J.A. 26-27).

The district court granted petitioner's motion for summary judgment. The court rejected respondent's claim that he was denied procedural due process by the inter-facility transfer because the Program Review Committee told him only that he was transferred as a security risk without informing him of the underlying reasons for that determination (Pet. App. 6b-10b). The court found that the notice provided met the requirements of *Cobb* v. *Aytch*, 643 F.2d 946, 961 (3d Cir. 1981) (en banc), on which

respondent had relied (Pet. App. 9b-10b). The court found, moreover, that in any event respondent's inter-facility transfer did not deprive him of any federally protected right (*id.* at 11b-12b). In this regard, the court found that petitioner had a rational basis for the emergency transfer of respondent to the state facility and that petitioner had followed well-defined procedures in accomplishing that end.[7] The court also found that the transfer did not deny respondent the right to effective assistance of counsel, because he was able to communicate with his attorney while at SCIH (*id.* at 18b-19b).

The district court also rejected respondent's challenges to his placement in administrative custody (Pet. App. 12b-18b). The court found that, although respondent did, under the principles of *Hewitt* v. *Helms*, 459 U.S. 460 (1983), acquire a liberty interest in remaining in the general prison population, he received sufficient notice and hearing to meet procedural due process requirements (Pet. App. 12b-15b). The court also found that respondent's assignment to administrative custody did not violate any substantive due process right because it was consistent with Pennsylvania regulations concerning the use of administrative custody pending determination of an appropriate security classification (*id.* at 15b-18b).

3. The court of appeals vacated the district court's decision in part and remanded (Pet. App. 1a-20a).

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[7] The court also dismissed this claim against the warden and deputy warden of SCIH, finding that they had no authority to bar respondent's transfer and so could not be sued under 42 U.S.C. 1983 with regard to that transfer (Pet. App. 11b-12b).

The question whether respondent was entitled to a hearing before a tribunal independent of the prison system rather than before the Program Review Committee was not addressed by the district court.

It held that, under *Cobb* v. *Aytch*, *supra*, a pretrial detainee's transfer from a county jail to a state prison implicates a federal constitutional liberty interest and that respondent was entitled to, but had not received, a prompt post-transfer hearing before an independent tribunal after his emergency transfer (Pet. App. 8a-10a). The wrongful denial, the court stated, was petitioner's responsibility (*id.* at 10a-13a). However, the court of appeals affirmed the district court's judgment that respondent had not been denied effective assistance of counsel (*id.* at 17a-18a).

The court of appeals also found that respondent had a protected liberty interest under *Hewitt* v. *Helms*, *supra*, in remaining in the general prison population and that the district court had erred in finding that respondent had sufficient notice of the charges that resulted in his placement in administrative custody and sufficient opportunity to defend against them (Pet. App. 13a-17a).[8]

SUMMARY OF ARGUMENT

1. A defendant who is properly detained pending trial (see *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)) does not have any general liberty interest in not being transferred from one detention facility to another. Just as a convicted inmate has no protected expectation that he will be incarcerated in (or will

[8] No further review has been sought on the administrative custody issue, which is now on remand to the district court. The court of appeals also remanded "to the District Court for its determination of whether to grant [Respondent's] Motion for Partial Summary Judgment and/or whether to hold a trial on any of the issues raised in the pleadings, such as issues of liability, qualified immunity, and damages" (Pet. App. 19a-20a).

remain in) any particular prison, a properly detained criminal defendant has no protected expectation that he will be sent to any particular facility in the first instance, nor does the fact that he was initially assigned to one facility create a protected expectation that he will remain here. Cf. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Meachum* v. *Fano*, 427 U.S. 215 (1976). Prison authorities have historically been free to house both convicted defendants and pretrial detainees in any facility permitted by applicable statutes and regulations, and the courts have traditionally declined to interfere with custodial authorities in their exercise of discretion in such matters, particularly as such discretion relates to security. Cf. *Block* v. *Rutherford*, No. 83-317 (July 3, 1984); *Bell* v. *Wolfish*, 441 U.S. 520, 540, 546-547 (1979).

2. Pretrial detainees do, of course, have specific rights that may not be violated by a transfer. Pretrial detainees may not be "punished" and must be afforded the rights, particularly as guaranteed by the Sixth Amendment, necessary to ensure a fair trial. But these rights do not generate a general liberty interest in where defendant is detained and do not require a transfer hearing before an independent tribunal in every instance. Whether a defendant is being punished or has been denied his right to effective assistance of counsel or a speedy trial must be determined on the facts of each case. See, *e.g.*, *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986) (speedy trial); *Block* v. *Rutherford*, *supra* (punishment); *United States* v. *Cronic*, 466 U.S. 648 (1984) (effective assistance of counsel); *Bell* v. *Wolfish*, *supra* (punishment). Such determinations may be made administratively, upon petition for writ

of habeas corpus, in a separate suit, or at or after trial, as appropriate. There is no reason to suppose, and it would be greatly disruptive to assume, that all transfers of detainees so threaten one or more of these rights as to require a hearing before an independent tribunal. Cf. *United States* v. *Goodwin*, 457 U.S. 368, 380-384 (1982); *Leary* v. *United States*, 395 U.S. 6 (1969).

Here, respondent failed to demonstrate a violation of any substantive right. The lower courts did not find, and there is no reason to suppose, that his transfer effected punishment or was not for a legitimate—here, a security—purpose. There is no allegation that the conditions of confinement were improper or that the right to a speedy trial was infringed. Finally, the district court and court of appeals both found that respondent was not denied the effective assistance of counsel.

ARGUMENT

A PRETRIAL DETAINEE HAS NO AUTOMATIC RIGHT TO A HEARING BEFORE AN INDEPENDENT TRIBUNAL IN CONNECTION WITH AN INTER-FACILITY TRANSFER FOR SECURITY REASONS

1. The court of appeals ruled that respondent was entitled to a hearing before an independent tribunal because he had a liberty interest in not being transferred from one facility to another. This, we submit, was error: there is no general liberty interest in being detained in, or remaining in, a particular facility. A liberty interest protected by the Due Process Clause may be derived from the Clause itself or from state law. *Hewitt* v. *Helms*, 459 U.S. 460, 466 (1983); *Meachum* v. *Fano*, 427 U.S. 215, 223-227 (1976). But the decision below is not based on any Pennsylvania state law liberty interest in being de-

tained in a particular facility.[9] And just as a convicted defendant has no federal constitutional right to be imprisoned in a particular facility or not to be transferred to another facility—see, *e.g.*, *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Montanye* v. *Haymes*, 427 U.S. 236 (1976); *Meachum* v. *Fano*, *supra*; *Ex parte Karstendick*, 93 U.S. 396, 400, 404 (1876); cf. *Howe* v. *Smith*, 452 U.S. 473 (1981)—so a pretrial detainee should not be deemed to have a general right to be placed, or to remain, in a particular facility.

A judicial officer having found probable cause that a defendant committed a crime, the state may detain him. See *Gerstein* v. *Pugh*, 420 U.S. 103, 114, 116-117 n.18, 117 n.19, 119 (1975). In this case, the district court found that respondent was validly detained pending his trial (Pet. App. 9b), and the court of appeals did not disturb this finding. Accordingly, respondent's initial confinement at CCJ was valid.

This Court has repeatedly held that prison officials holding convicted prisoners and pretrial detainees have broad discretion to take security measures without judicial review. "[T]o hold * * * that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have

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[9] The Third Circuit stated in *Cobb* v. *Aytch*, 643 F.2d 946, 953-957 (1981) (en banc), that in Pennsylvania a convicted prisoner has no state-created liberty interest in remaining in the same facility; the court in that case did not disturb the trial judge's finding that pretrial detainees had no such state law interest either. In the present case, it is unclear whether the court of appeals found such a state law right (see Pet. App. 9a n.1), but the court plainly did not rely on such an interest. Cf. *Olim* v. *Wakinekona*, 461 U.S. 238, 244 n.5 (1983).

been the business of prison administrators rather than of the federal courts." *Meachum* v. *Fano*, 427 U.S. at 225 (emphasis in original) (convicted prisoners). "[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes* v. *Chapman*, 452 U.S. 337, 349 n.14 (1981) (convicted prisoners). "[L]imited restriction[s] [are] * * * a rational response by prison officials to * * * obvious security problem[s]" (*Bell* v. *Wolfish*, 441 U.S. at 550) (pretrial detainees), and have been consistently upheld for convicted and unconvicted inmates alike in the face of a variety of constitutional claims. The Court has "repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests." *Hewitt* v. *Helms*, 459 U.S. at 467. See also *Olim* v. *Wakinekona*, 461 U.S. at 245; *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

This Court has recognized that pretrial detainees may pose security problems equal to those posed by convicted prisoners and that dealing with these problems is a matter over which prison officials have broad discretion. *Block* v. *Rutherford*, No. 83-317 (July 3, 1984); *Bell* v. *Wolfish*, 441 U.S. 520, 540, 546-547 (1979). In *Wolfish*, the Court stated, "There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." 441 U.S. at 546 n.28. The security concerns to which this Court has referred in holding that prison officials must have broad discretion in maintaining safety and order in prisons (see, *e.g.*, *Hewitt* v. *Helms*, 459 U.S.

at 467-468, 472-473) are, therefore, applicable to pretrial detainees as well.

Since respondent had been validly detained pending trial, and since he plainly had no inherent constitutional right to be detained in any particular institution in the first instance, it follows that his initial detainment at one facility could not give him a protected general liberty interest in remaining in a facility that the authorities believed was not secure enough for him. On the contrary, the custodial officials had an obligation to the other prisoners at the jail, to its guards, and to the general public to exercise their discretion to protect others against respondent's potential dangerousness. See, *e.g.*, *Martin* v. *White*, 742 F.2d 469 (8th Cir. 1984). Other courts of appeals have approved transfers of pretrial detainees without hearings where the transfers were for legitimate government reasons. See, *e.g.*, *Turner* v. *Stumbo*, 701 F.2d 567, 570-572 (6th Cir. 1983); *Cummings* v. *Roberts*, 628 F.2d 1065, 1069 (8th Cir. 1980); *Feeley* v. *Sampson*, 570 F.2d 364, 376-377 (1st Cir. 1978).

2. Pretrial detainees do, of course, have specific rights that may not be violated by a transfer. Pretrial detainees may not be "punished" and must be afforded the rights, particularly as guaranteed by the Sixth Amendment, necessary to ensure a fair trial. But any alleged violation of a specific right can be adjudicated at trial or in another proceeding addressed to the specific claim. There is no need for automatic review by an independent tribunal of every inter-facility transfer on the speculation that a specific right may be violated.[10]

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[10] Any requirement that a hearing be held by an independent tribunal in connection with every transfer of a pretrial

The primary constitutional difference between the conditions under which pretrial detainees and convicted prisoners may be confined is that a pretrial detainee may not be detained for the purpose of punishment. See *Block* v. *Rutherford*, slip op. 7; *Schall* v. *Martin*, 467 U.S. 253, 269 (1984); *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Bell* v. *Wolfish*, 441 U.S. at 535 & n.16 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 n.40 (1977). He may, however, be detained for the purpose of securing his appearance in court, protecting the judicial process against obstruction, and protecting the public against further dangerous criminal activity. See, *e.g.*, 18 U.S.C. (Supp. II) 3142(f);

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detainee would have a substantial impact on federal, state, and local custodial systems and on the courts. According to the Bureau of Prisons, in fiscal year 1984, 229 unsentenced (pretrial and posttrial) detainees were transferred between federal facilities a total of 298 times, and in fiscal year 1985, 330 such detainees were transferred 430 times. In the federal system, moreover, pretrial detainees historically were housed primarily in local jail facilities while awaiting trial (U.S. Dep't of Justice, *Federal Prison System Program Statement No. 7331.2*, § 1 note (Nov. 10, 1980); U.S. Dep't of Justice, *U.S. Marshals Manual* § 8.12-1(b) (Sept. 1983)); today, more than half of federal pretrial detainees are still housed in state and local facilities under contract with the United States Marshals Service. Figures on the number of transfers involving federal prisoners in state and local facilities are unavailable, but these transfers occur regularly (for a variety of purposes) and number substantially more than the intrafederal transfers. The Marshals Service has no provision for notice and hearing regarding transfer of a pretrial detainee within the institution or to another institution; the Bureau of Prisons provides for hearing only in certain instances (none common), such as when a pretrial detainee is charged with a violation of institution rules (28 C.F.R. 551.116).

Schall v. *Martin*, 467 U.S. at 264-274; *Bell* v. *Wolfish*, 441 U.S. at 533-534, 537, 539. As this Court explained in *Bell* v. *Wolfish*, 441 U.S. at 539 (citation and footnote omitted):

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

In addition, a pretrial detainee is, like anyone charged with a crime, entitled under the Sixth Amendment to reasonable access to counsel in order to prepare his defense (see *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), slip op. 8-10; *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *Powell* v. *Alabama*, 287 U.S. 45 (1932)) and to a speedy trial (see *United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 7-8; *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982); *United States* v. *Marion*, 404 U.S. 307, 320 (1971)).

It is possible, of course, that in a particular instance the transfer of a pretrial detainee will effect a violation of a specific right—will punish him, delay his trial, or deny him effective assistance of counsel. But no specific right of respondent was violated here, and the hearing itself should not have been made a matter of substantive right.

There is no reason to presume that an inter-facility transfer will have more than a de minimis effect on the detainee's conditions of confinement or that it

will be made for other than legitimate (often security or overcrowding) reasons. See *Block* v. *Rutherford*, slip op. 7; *Bell* v. *Wolfish*, 441 U.S. at 537-540 & n.21, 542-543 & n.25; cf. *Ingraham* v. *Wright*, 430 U.S. at 674. An automatic hearing is, moreover, unnecessary to protect the rights of a particular detainee who believes he is being punished.[11]

Similarly, the courts can provide remedies for interference with the right to counsel and the right to a speedy trial wherever actual interference with those rights has occurred, but should not intervene in broad theoretical anticipation of such interference. See, *e.g.*, *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986) (effective assistance of counsel); *United States* v. *Loud Hawk*, *supra* (speedy trial); *Block* v. *Rutherford*, *supra* (punishment); *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984) (effective assistance of counsel); *United States* v. *Cronic*, 466 U.S. 648, 657-662 (1984) (effective assistance of counsel); *Barker* v. *Wingo*, 407 U.S. 514 (1972) (speedy trial); *Bell* v. *Wolfish*, *supra* (punishment). See also *United States* v. *Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985). There is no reason to require a hearing in connection with every inter-facility transfer in anticipation of a wrong that has not been alleged, much less shown. Cf. *United States* v. *Goodwin*, 457 U.S. 368, 380-384 (1982); *Leary* v. *United States*, 395

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[11] The pretrial detainee faced in a particular case with the denial of a constitutional right will not be without recourse. He may invoke administrative remedies, file a motion for a pretrial order from the trial judge, seek a writ of habeas corpus, or file a separate action. See *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); cf. 18 U.S.C. 3164(c); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States* v. *Colombo*, 777 F.2d 96 (2d Cir. 1985).

U.S. 6 (1969). See also *Mackey* v. *Montrym*, 443 U.S. 1, 14 (1979) (citation omitted) (the procedures required by due process "must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of cases' rather than the 'rare exceptions' "); *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (same). The rights of pretrial detainees can be protected on a case-by-case basis.

Here there is no evidence that the purpose of respondent's transfer was punitive or was not the asserted, legitimate government purpose of prison security.[12] Respondent did not allege that his transfer denied him the right to a speedy trial. Although he claimed below that the transfer resulted in the deprivation of his Sixth Amendment right to effective assistance of counsel, both the district court and the court of appeals rejected the claim and he did not cross-petition for certiorari on the issue here.[13] Thus, "[t]he predicate for invoking the protection of the Fourteenth Amendment * * * is totally nonexistent in this case." *Meachum* v. *Fano*, 427 U.S. at 227. Without this predicate, respondent's due process claim cannot stand. "Process is not an end in itself. Its constitutional purpose is to protect a substantive

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[12] See, *e.g.*, Pet. App. 11b. Respondent asserted in his complaint (J.A. 31, 32, 35-36) that the transfer "punished" him without due process, but he has apparently never elaborated on this assertion.

[13] The court of appeals relied on its earlier decision in *Cobb* v. *Aytch*, 643 F.2d 946 (3d Cir. 1981) (en banc), in holding that respondent had been denied due process. In *Cobb*, however, the court found actual violations of the Sixth Amendment right to counsel, an allegation explicitly rejected by both the district court and the court of appeals in this case. (The court in *Cobb* did, however, grant broad injunctive relief in the class action there.)

interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. at 250 (citation omitted). Here, respondent has no legitimate claim of entitlement to protect a substantive interest, and hence no claim that he was denied due process.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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